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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ESTAFANO HILL,

Defendant and Appellant.

D073931

(Super. Ct. No. SCD274024)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed.

Gregory L. Rickard, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Susan Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Estafano Hill<sup>1</sup> of resisting an executive officer (Pen. Code, § 69;<sup>2</sup> count 1), and resisting an officer (§ 148, subd. (a)(1); count 2). The court found true seven prison priors within the meaning of sections 667.5, subdivision (b), and 668. The court found true one strike prior for purposes of probation ineligibility.

The court sentenced Hill to six years in prison, consisting of the middle term of two years on count 1, doubled to four years by the prior strike, plus an additional one year each for two prison priors to run consecutively to the four-year term. The court, in its discretion under section 1385, struck the remaining five prison priors. The court sentenced Hill to time served on count 2 to run concurrently with the sentence on count 1.

Hill appeals, contending that his conviction on count 1 for resisting an executive officer should be reversed because the officer failed to comply with section 841, which requires that a person making an arrest inform the person to be arrested of the intent to arrest, the cause of the arrest, and the authority to make the arrest. Based on this failure, Hill claims his conviction is not supported by substantial evidence because, when he acted, he did not know that the officer was performing his lawful duty. We conclude that substantial evidence supports his conviction.

In a supplemental brief, Hill relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) to argue that the trial court could not legally impose a restitution fine and

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<sup>1</sup> Although the defendant is identified as Dennis Smith in various documents below, at the preliminary hearing the public defender confirmed his true name as Estafano Hill, as is shown on the abstract of judgment. We refer to defendant as Estafano Hill.

<sup>2</sup> Undesignated statutory references are to the Penal Code.

certain mandatory assessments without first determining his ability to pay. He requests that we vacate the assessments and stay the restitution fine until the People prove he has the ability to pay. Thereafter, Hill filed an informal motion in the superior court to correct the imposition of fines and fees, citing his inability to pay. We relinquished subject matter jurisdiction to the superior court for the limited purpose of hearing and ruling on Hill's pending motion. On April 26, 2019, the superior court issued a written order denying Hill's motion. In his supplemental reply brief, Hill again requests that we vacate the assessments and stay the restitution fine until the People prove he has the ability to pay. Alternatively, he requests that we remand the matter so that he can prove his inability to pay at an evidentiary hearing. We conclude that Hill forfeited this issue.

## FACTUAL BACKGROUND

### *A. July 2017 Incident*

On a day in July 2017, Officer Chappell was driving alone in uniform in his marked patrol car and saw Hill, who he knew from previous contacts, standing at a bus stop. The officer did a records check and discovered an outstanding warrant for Hill's arrest. Concerned that Hill might flee and board an approaching bus once he discovered there was a warrant for his arrest, the officer quickly exited his car and called out to Hill as he approached. The officer told Hill that he wanted to put him in handcuffs so they could talk.

Hill was inquisitive and wanted to know why he needed to be in handcuffs and why they could not talk face-to-face. Despite verbal resistance, Hill initially complied and brought his hands behind his back. Each time the officer tried to reach for his

handcuffs, Hill tensed up and pulled his hands away. Hill knocked Officer Chappell in the chest as he swung his arm away from the officer's grip, broke loose, and started to run. Officer Chappell ran after Hill, caught and secured him, but Hill continued to struggle. Hill said he wanted to sit. Concerned that Hill would try to run if he let go, Officer Chappell held onto him. Hill dropped his weight to the ground, where Officer Chappell followed. The two men struggled and rolled back and forth into the street, where Officer Chappell handcuffed Hill and took him into custody. Officer Chappell sustained bumps and bruises from the interaction.

#### *B. October 2017 Incident<sup>3</sup>*

On a day in October 2017, at the start of his shift, Officer Chappell did a records check for known contacts and found Hill had two misdemeanor arrest warrants. That morning, as he drove alone in full uniform in his patrol car, Officer Chappell saw Hill 30 yards away sitting on a bicycle in an alley that had a clear exit in the opposite direction.

Officer Chappell called for additional units and turned on his body camera. He parked and exited his car and called out to Hill, who was not facing him. As Officer Chappell approached Hill from behind, he instructed Hill to put his hands behind his back so he could put him in handcuffs "before we . . . fight."

Hill protested, "Are we going to do this again?" When Officer Chappell reached Hill's bicycle, he placed his hand on its tire to prevent Hill from escaping. When Hill depressed the pedal and the bicycle moved forward, Officer Chappell pulled his hand

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<sup>3</sup> We refer to the July incident as the first incident and the October incident as the second incident.

away from the tire, letting go of the bicycle, to protect his hand. Officer Chappell moved forward quickly to grab and secure Hill. Both men fell on the bicycle, then onto the ground. They regained their footing, and Officer Chappell grabbed Hill as Hill moved toward Officer Chappell. The two men struggled as Hill tried to get away and, at one point, Hill's movements caused Officer Chappell to fall. From the ground, Officer Chappell grabbed Hill's legs and worked his way up Hill's body. The two men collided into a fence where Officer Chappell was able to secure Hill until additional officers arrived to assist.

Officer Chappell suffered abrasions, pain, and swelling in his knees. Officer Chappell was placed on light duty for two days and sent home early because of pain. At the time of his testimony, he was still wearing a brace for his right knee.

## DISCUSSION

Hill contends insufficient evidence supports his conviction for the second incident because when he acted, he did not know that Officer Chappell was performing his lawful duty. Specifically, Hill contends that Officer Chappell acted unlawfully when he attempted to apply handcuffs without complying with section 841, which requires that a person making an arrest inform the person to be arrested of the intention to arrest, the cause of the arrest, and the authority to make the arrest. Hill argues, therefore, that he cannot be liable for resisting Officer Chappell and his conviction should be reversed.

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value

from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) " 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.' " (*People v. Clark* (2011) 52 Cal.4th 856, 943.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Little* (2004) 115 Cal.App.4th 766, 771.) The testimony of a single witness, if believed by the jury, is sufficient to support a conviction, unless that testimony is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) " '[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Hatch* (2000) 22 Cal.4th 260, 272, italics omitted.)

Under section 69, it is a crime to "knowingly resist[], by the use of force or violence, the officer, in the performance of his or her duty." (§ 69.) CALCRIM No. 2652 instructed the jurors that a violation of section 69 consists of the following three elements: "1. The defendant unlawfully used force to resist an executive officer; [¶] 2. When the defendant acted, the officer was performing his lawful duty; [¶] AND [¶] 3. When the defendant acted, he knew the executive officer was performing his duty.

[¶] An *executive officer* is a government official who may use his or her own discretion in performing his or her duties."<sup>4</sup>

Because an officer has no duty to engage in illegal conduct, the duty referenced in section 69 must be "lawful" conduct. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217, superseded by statute on another ground, as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.) "[T]he lawfulness of the victim's conduct forms part of the corpus delicti of the offense." (*Ibid.*) Officers carrying out the command of a valid arrest warrant are lawfully engaged in their duties. (*Id.* at p. 1218.) CALCRIM No. 2652 also instructed the jurors that "[t]he duties of a San Diego Police Officer include arresting people for outstanding warrants." Likewise, another jury instruction on "[u]nlawful [a]rrest," instructed that "[a] peace officer may legally arrest someone . . . on the basis of an arrest warrant."<sup>5</sup> (CALCRIM No. 2670, italics omitted.)

Under section 841, "[t]he person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it" unless an exception applies. Section 841 sets forth three exceptions to this requirement: when the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or the person to be arrested is pursued immediately after its commission, or after an escape. "The reason that notification of official character of the person making an

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<sup>4</sup> "Police officers are 'executive officers' under section 69." (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 984, fn. 2 (*Carrasco*).)

<sup>5</sup> San Diego police officers are "peace officers" under section 830.1.

arrest is not required when the party is apprehended in the commission of an offense . . . is because he must know the reason why he is arrested.' " (*People v. Darnell* (1951) 107 Cal.App.2d 541, 545, disapproved on other grounds in *In re Culver* (1968) 69 Cal.2d 898, 904 & fn. 8; see also *People v. Young* (1934) 136 Cal.App. 699, 705 [" 'Where a party is apprehended in the commission of an offense, or upon fresh pursuit afterward, notice of the official character of the person making the arrest or of the cause of the arrest is not necessary, because he must know the reason why he is apprehended.' "])

The "failure to announce the cause of an arrest does not invalidate the arrest . . . ." (*People v. Superior Court* (1972) 7 Cal.3d 186, 217.) "[I]t is established beyond dispute that strict compliance with th[is] provision[] is not required and a failure to comply therewith is excused if the officer acts in a good faith belief that compliance would increase his peril[.]" (*People v. Braun* (1973) 29 Cal.App.3d 949, 969 (*Braun*), disapproved on other grounds by *People v. Green* (1980) 27 Cal.3d 1, 25, fn. 10, *Green* overruled on another ground & superseded by statute as stated in *People v. Martinez* (1999) 20 Cal.4th 225, 239; *People v. Superior Court* (1968) 264 Cal.App.2d 165, 171-172, ["[F]ailure to observe these statutory requirements may be overlooked when necessary for the safety of an officer . . . ."]; see also *People v. Vasquez* (1967) 256 Cal.App.2d 342, 345 (*Vasquez*) ["[A] police officer's reasonable belief that compliance with section 841 would frustrate an arrest excuses strict compliance with that section."].) "A police officer's uniform is sufficient indicia of authority to make the arrest." (*People v. Superior Court* (1973) 35 Cal.App.3d 1, 5.)



Under section 834a, "[i]f a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force . . . to resist such arrest." Section 834a requires that a person who is being arrested refrain from using force, whether the arrest is lawful or unlawful. (*In re Bacon* (1966) 240 Cal.App.2d 34, 53, disapproved on another point in *In re Brown* (1973) 9 Cal.3d 612, 623-624.) In *Carrasco, supra*, 163 Cal.App.4th at page 985, the court found that if an appellant resisted an officer at all, he did so forcefully.

Although section 69 has three elements, Hill primarily takes issue with the third, whether he knowingly resisted Officer Chappell performing his duty. However, the third element is related to the second—that when Hill resisted, Officer Chappell was performing his lawful duty. Hill contends that Officer Chappell's failure to comply with the notice requirements of section 841 created a situation where Hill lacked knowledge that Officer Chappell was acting lawfully. Specifically, Hill contends that by refusing to answer Hill's question why he needed to be in handcuffs before placing him in them, Officer Chappell offered Hill no basis on which to decide the validity of Officer Chappell's actions. This argument is meritless for two reasons.

First, as noted, if an officer acts in a good faith belief that compliance with section 841 would increase his peril, strict compliance is not required. (*Braun, supra*, 29 Cal.App.3d at p. 969.) Here, Officer Chappell had multiple previous interactions with Hill including four arrests. Officer Chappell testified that in all previous interactions with Hill, Hill had been very agitated. The two men had a history and Hill knew Officer Chappell.

When Officer Chappell saw Hill in October sitting on a bicycle in an alley with a clear exit, he suspected Hill would flee down the alley on his bicycle once he saw Officer Chappell. Therefore, Officer Chappell backed out of the alley to call for backup before returning and parking. Officer Chappell testified that during the first incident, Hill was physically assaultive and Officer Chappell wanted to avoid the same type of interaction during the second incident. Officer Chappell testified that Hill "was known to fight with [him]," and because of their history, he believed that the safest alternative was to put Hill in handcuffs before informing him of the outstanding warrants. He wanted to secure Hill to prevent a fight or flight and to protect his own safety and that of others.

In full uniform and in broad daylight, Officer Chappell approached Hill after calling out to him. Officer Chappell testified that when he was about 10 feet away, Hill turned and recognized him. Hill acknowledged Officer Chappell. As Officer Chappell approached Hill, he told Hill that he wanted Hill to put his hands behind his back to be handcuffed. Officer Chappell testified that he believed it would be safer for both men if Hill's hands were secured before he informed Hill of the outstanding warrants.

As a result, it became a timing issue. From the body camera video, it is evident that the interaction was very brief.<sup>6</sup> When Hill did not comply with Officer Chappell's request and immediately attempted to flee, he made it impossible for Officer Chappell to comply with section 841. This was not a situation involving strangers. Hill knew that

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<sup>6</sup> The body camera video of this incident is a total of three minutes 16 seconds. The first 30 seconds are comprised of Officer Chappell parking and exiting the patrol car. Within 30 seconds of exiting the car, Officer Chappell is struggling to capture Hill and his camera is knocked off his body. The remaining two minutes are audio only.

Chappell was a police officer because Officer Chappell had arrested Hill four previous times. Officer Chappell testified that when he told Hill he wanted to handcuff him "before they fight," he hoped that would trigger Hill's memory of the first incident and that Hill would then submit to the handcuffs so he could inform Hill about the warrants. Instead, Hill attempted to flee on the bicycle, preventing Officer Chappell from being able to carry out the strictures of section 841.

Even if Hill's argument had merit, section 834a imposed a duty on Hill to not resist Officer Chappell. This duty is especially pertinent given the history of these two men. Hill's argument that he did not have knowledge as to what Officer Chappell was doing rings hollow. Accordingly, we conclude there was substantial evidence for the jury to find that Officer Chappell's actions were lawful.

Disagreeing with this result, Hill contends that because section 841 lists three specific exceptions to the notice requirement, none of which apply here, we must infer that no other exception exists.<sup>7</sup> Based on this rule of statutory construction, Hill contends that because no other exceptions were spelled out by the Legislature in section 841, the only logical inference is that all other exceptions are excluded. Although it is true that a statute that includes things but not others is presumed to exclude those it fails to include, this rule is not the only principle of statutory construction. (*Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 90.) The maxim "is

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<sup>7</sup> In his reply brief, Hill references the Latin phrase "expressio unius est exclusio alterius" which means that the express mention of some things excludes all others not expressed. (Italics omitted.)

no magical incantation, nor does it refer to an immutable rule. Like all such guidelines, it has many exceptions . . . ." (*Estate of Banerjee* (1978) 21 Cal.3d 527, 539.) Section 841 was enacted in 1872. As noted, cases have not required that the statute be strictly complied with if doing so puts an officer in peril. (*Braun, supra*, 29 Cal.App.3d at p. 969; *People v. Superior Court, supra*, 264 Cal.App.2d at pp. 171-172; *Vasquez, supra*, 256 Cal.App.2d at p. 345.) In light of case authority, we conclude that Hill's statutory construction argument lacks merit.

Viewing the evidence in its totality, including circumstantial evidence and any reasonable inferences drawn from that evidence, we conclude that substantial evidence supports the jury's conclusion that Hill resisted arrest. Hill makes a brief reference to a violation of his federal due process rights. He suggests that convictions not supported by sufficient evidence constitute a violation of the right to due process. Having concluded his convictions are supported by sufficient and substantial evidence, this claim is meritless.<sup>8</sup>

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<sup>8</sup> In an attempt to emphasize the importance of lawful duty, Hill reviews numerous cases in his reply brief involving the express exceptions to the requirements of section 841—an officer arresting a suspect committing a criminal act, fleeing after just committing a criminal act, or escaping. (§ 841.) As we already noted, the statutory exceptions exist, in theory, because the criminal is aware he is committing a criminal act, thus there is no need to inform him of the reason for his arrest. Because this case does not involve one of these exceptions, we find these cases irrelevant.

Hill also reviews a handful of cases in which the statute did not need to be complied with for other reasons than the stated exceptions of the statute. Because they have no bearing on this case, we decline to discuss them.

## II. *HILL FORFEITED HIS CHALLENGE TO THE ASSESSMENTS, FEE, AND RESTITUTION FINE*

At sentencing, the trial court imposed: (1) a \$60 court facilities assessment under Government Code section 70373, (2) an \$80 court operations assessment under Penal Code section 1465.8, (3) a \$154 criminal justice administration fee under Government Code section 29550.1, (4) an \$1,800 restitution fine under Penal Code section 1202.4, and (5) an \$1,800 parole revocation fine under Penal Code section 1202.45. In a supplemental brief, Hill requests that we vacate the assessments and fee, and stay the fines until the prosecution proves his ability to pay them. Citing *Dueñas*, Hill contends that imposing the assessments, fee and fines without a hearing to determine his present ability to pay them violated his due process rights guaranteed by the federal and California constitutions. He contends that the issue is not forfeited because the trial court made a legal error at sentencing that is subject to de novo review, and it would have been futile to object. We disagree.

*Dueñas, supra*, 30 Cal.App.5th 1157 held that imposition of assessments is fundamentally unfair and imposition of assessments on indigent defendants without determining their ability to pay is a violation of their due process rights under the United States and California Constitutions. (*Id.* at p. 1168.) *Dueñas* also points out that due process issues usually converge with equal protection, and case law dealing with fairness issues between a criminal defendant and the state has historically drawn on both due

process and equal protection principles when imposing financial burdens on an indigent defendant. (*Id.* at p. 1168, fn. 4.)<sup>9</sup>

Hill asserts that the trial court erred in imposing the assessments, fee, or fines without first determining his ability to pay because they are mandatory and the court had an obligation to consider his ability to pay. Hill contends that the issue is not forfeited because the trial court made a legal error at sentencing that is subject to de novo review, and claims it would have been futile to object.

The mandatory minimum fine under section 1202.4, subdivision (b)(1) for a felony conviction is \$300, which the Legislature intended to be punitive in nature and is imposed on all convicted defendants. (*Id.*, subd. (a)(2).) The fine is mandatory unless the court finds compelling and extraordinary reasons which it must state on the record. (*Id.*, subd. (c).) A defendant's inability to pay cannot be considered a compelling and

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<sup>9</sup> A bill currently pending in the Legislature proposes the following factors be considered in establishing a defendant's inability to pay: the defendant's present financial circumstances, taking into consideration the imposed term of incarceration; whether the defendant is receiving any type of government benefits, including means-tested benefits; whether the defendant was represented by court-appointed counsel; the defendant's reasonably discernible future financial circumstances; the likelihood the defendant will be able to obtain employment within a six-month period from the date of the court's consideration of the issue; the amount of victim restitution ordered, if any; any other factor that may bear upon the defendant's inability to pay; and the prosecution shall bear the burden of rebutting the presumption that the defendant does not have the ability to pay, and proposes it shall be presumed the defendant does not have the ability to pay under any of the following circumstances: the defendant is homeless, lives in a shelter or a transitional living facility; the defendant receives need-based public assistance; the defendant is very low income, as defined in section 50105 of the Health and Safety Code; the defendant is sentenced to state prison for an indeterminate term or for a term of life without the possibility of parole. (Assem. Bill No. 927 (2019–2020 Reg. Sess.) § 1, as amended Mar. 27, 2019.)

extraordinary reason to not impose the fine. (*Ibid.*) A defendant's ability to pay may be considered only for the fine imposed in excess of the minimum fine. (*Id.*, subd. (b)(1).) The court must consider any relevant factors, including ability to pay, for the amount of restitution fine in excess of the mandatory minimum. (*Id.*, subd. (d).) While a defendant shall bear the burden of demonstrating his or her ability to pay, a separate hearing for the fine shall not be required. (*Ibid.*) Because defendants are in the best position to adjudge whether they have the ability to pay, it is incumbent upon them to object to the fine and to show why it should not be imposed. (*People v. Avila* (2009) 46 Cal.4th 680, 729 (*Avila*); *People v. McMahan* (1992) 3 Cal.App.4th 740, 749 ["[T]he most knowledgeable person regarding the defendant's ability to pay would be the defendant himself."].) It is well established that a defendant forfeits a challenge to the trial court's imposition of a restitution fine above the statutory minimum for failing to consider his or her ability to pay if the defendant did not object in the trial court. (*People v. Nelson* (2011) 51 Cal.4th 198, 227 [alleged erroneous failure to consider ability to pay a \$10,000 restitution fine forfeited by the failure to object]; *Avila*, at p. 729 [forfeiture rule applies to claim that restitution fine amounted to an unauthorized sentence based on inability to pay].)

Here, the court imposed a restitution fine of \$1,800, an amount in excess of the mandatory \$300 minimum. Thus, the additional \$1,500 was discretionary and de novo review does not apply. (§ 1202.4, subd. (b)(1).) The probation report recommended a restitution fine pursuant to section 1202.4, subdivision (b), in the amount of \$2,700. Thus, Hill had notice of the recommended restitution fine in excess of the mandatory minimum, yet did not object at sentencing. Unlike the defendant in *Dueñas*, *supra*, 30

Cal.App.5th 1157, who created an extensive record showing her inability to pay \$220 in assessments and fines, Hill did not object in the trial court on the grounds that he was unable to pay, nor did he request an ability-to-pay hearing. (*Id.* at pp. 1161-1163; *People v. Castellano* (2019) 33 Cal.App.5th 485, 490 (*Castellano*) ["Consistent with *Dueñas*, a defendant must in the first instance contest in the trial court his or her ability to pay . . ."].) Accordingly, we conclude that he forfeited this argument. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154 (*Frandsen*).)

Hill contends that the general forfeiture rule should not apply. He argues that we should follow *Castellano*, *supra*, 33 Cal.App.5th 485, which declined to apply forfeiture because *Dueñas* had not yet been decided, and no California court prior to *Dueñas* had held it unconstitutional to impose fines, fees or assessments without a determination of a defendant's ability to pay. (*Id.* at p. 489.) In *Castellano* the trial court imposed the minimum mandatory \$300 restitution fine for a felony conviction. (*Id.* at p. 488.) In this situation, a trial court is not statutorily authorized to consider a defendant's inability to pay. (§ 1202.4, subd. (d).) Accordingly, *Castellano* is factually distinguishable.

Hill further contends there was no forfeiture because it would have been futile to object because governing law at the time afforded " ' "scant grounds for objection." ' "

We disagree. Prior to *Dueñas*, *supra*, 30 Cal.App.5th 1157, section 1202.4 required a defendant to object to the amount of the fine and demonstrate his or her inability to pay anything more than the statutory minimum. (§ 1202.4, subds. (c)-(d); *Avila*, *supra*, 46 Cal.4th at p. 729.) Because the \$1,800 restitution fine imposed is greater than the



statutory minimum, it would not have been futile for Hill to request an ability-to-pay determination. Hill's failure to object to an \$1,800 restitution fine is inexcusable. Had Hill objected to the amount of the restitution fine and requested an ability-to-pay hearing, he would have preserved his inability to pay objection to the \$294 imposed in assessments and fees. (See *Frandsen, supra*, 33 Cal.App.5th at p. 1154 ["Given his failure to object to a \$10,000 restitution fine based on inability to pay, Frandsen has not shown a basis to vacate assessments totaling \$120 for inability to pay."].)

Finally, we reject Hill's alternative request that we remand the matter to the trial court for an evidentiary hearing on his ability to pay. We relinquished subject matter jurisdiction of this case to allow the trial court to decide Hill's informal motion to correct the imposition of fines and fees. Hill did not request an evidentiary hearing on that motion. The trial court denied Hill's motion finding forfeiture and, even if the issue was not forfeited, Hill provided no factual basis upon which this court could conclude he is unable to pay the fines, fees, assessments and restitution. We decline to give Hill a third bite at the apple.<sup>10</sup>

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<sup>10</sup> We acknowledge that *Dueñas, supra*, 30 Cal.App.5th 1157 stayed execution of the restitution fee "until and unless *the People* demonstrate that the defendant has the ability to pay the fine." (*Id.* at p. 1172, italics added.) This statement, however, must be interpreted based on the facts of *Dueñas* where the defendant made an extensive record in the trial court showing her inability to pay. (*Id.* at pp. 1161-1163.) Consistent with *Castellano, supra*, 33 Cal.App.5th at page 490, we interpret *Dueñas* as requiring the defendant, in the first instance, to "contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court." (*Ibid.*)

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.